Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	)	WC Docket No. 02-112
	)	

REPLY COMMENTS OF QWEST SERVICES CORP. ON SECTION 272(f)(1) SUNSET OF THE BOC SEPARATE AFFILIATE AND RELATED REQUIREMENTS

Pursuant to Section 1.415(c) of the Federal Communications Commission's ("Commission") Rules, 47 C.F.R. Section 1.415(c), Qwest Services Corp. ("Qwest") hereby submits its reply comments in the above-captioned *Notice of Proposed Rulemaking* regarding the timing of Section 272(f)(1)'s sunset of the separate affiliate and related requirements of Section 272.[1]

Qwest agrees with the other Bell Operating Companies ("BOC") that the Act establishes a statutory presumption or general rule that the requirements of Section 272 should sunset within three years, and that the burden of persuasion is on those advocating an extension. Even though the clear purpose of Section 272 is to protect competition in the long distance marketplace, commenters advocating an extension misread Congressional intent by relying on an asserted lack of competition in the *local* marketplace. But even if the protection of local competition were a relevant inquiry, enforcement of the remaining mechanisms will meet that objective.

A number of commenters also point to alleged past BOC misconduct -- unrelated to Section 272 -- as the basis for an extension. But apart from overstating their case on the fact that the BOCs have been subject to enforcement actions in the past only demonstrates that existing mechanisms work.

Finally, the advocates of an extension simply ignore the costs that accompany unnecessary regulation, as well as the benefits that the BOCs would bring to competition in the

[1] *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements,* WC Docket No. 02-112, *Notice of Proposed Rulemaking*, DA 02-148, rel. May 24, 2002.

long distance marketplace if they were allowed to compete without the constraints of such unnecessary regulation.

I. PROPONENTS OF EXTENDING THE SUNSET FAIL TO DEMONSTRATE WHY ENFORCEMENT OF NON-STRUCTURAL SAFEGUARDS WOULD NOT PROTECT COMPETITION IN THE LONG DISTANCE MARKETPLACE.

Although the burden of persuasion is on those seeking an extension to demonstrate its necessity to protect competition in the *long distance* market, the majority of commenters assert that an extension is necessary because there is a lack of *local* competition, which is wholly unrelated to the underlying purposes of Section 272. Moreover, these commenters rely on allegations of past BOC misconduct that is similarly unrelated to Section 272. These commenters seem to ignore, however, the fact that any concerns over the potential for abuse by the BOCs in *any* market can readily be addressed by the enforcement of other provisions of the Act and the Commission's regulations that will remain even after Section 272 sunsets. In the end, the only purpose served by an extension would be to impose additional costs that would disadvantage the BOCs in competing with the proposed extension's proponents.

A. Commenters Seeking To Extend "By Rule Or Order" The Statutory Presumption Of A Three-Year Sunset Period Bear The Burden Of Persuasion.

The Administrative Procedure Act ("APA") is explicit that "the proponent of a rule or order has the burden of proof."[2] Because the balance of Section 272 will sunset unless "the Commission extends such 3-year period by rule or order,"[3] the APA places the burden of proof on those parties seeking an extension. Qwest agrees with those commenters asserting that Section 272 contains a "statutory presumption" or "general rule" that it will sunset within three years absent compelling circumstances to extend the sunset.[4] This approach is consistent with both the plain language of the statute, and the manner in which the Commission has approached similar sunsets.[5]

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[2] 5 U.S.C. § 556(d).

[3] 47 U.S.C. § 272(f)(1).

[4] *See* BellSouth at 4; SBC at 19-21; Verizon at 3.

[5] *See In the Matter of Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, As Amended*, *Memorandum Opinion and Order*, 15 FCC Rcd.

As demonstrated in Qwest's initial comments and these reply comments, there are no compelling circumstances to extend the sunset, and no commenter advocating an extension has met its burden of persuasion to rebut the three-year statutory presumption or general rule.

B. The Suggested Lack Of Competition In The Local Market Cannot Serve As The Basis For Extending A Statute Whose Purpose Is To Protect Competition In The Long Distance Market.

Numerous commenters suggest that Section 272 should not sunset until local markets become more open.[6] Indeed, a number of commenters go so far as to suggest that a showing of non-dominance or other lack of market power by the BOCs should be read into the sunset analysis.[7] Those advocating such an analysis misread Congressional intent. Congress did not adopt Section 272 to enhance or maintain competition in *local* markets. That is the purpose underlying Sections 251 and 271. Indeed, the Commission found that "[t]he section 251 requirements are designed to ensure that incumbent [local exchange carriers] LECs do not discriminate in opening their bottleneck facilities to competitors,"[8] and the BOCs cannot enter the long distance markets until they have complied with the "competitive checklist" of Section 271.[9] By contrast, the Commission specifically found that the "goal [of Section 272] is to ensure that BOCs do not use their control over local exchange bottlenecks to undermine competition in the *new markets* they are entering -- *interLATA services* and manufacturing . . . [and] to protect competition

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7066, 7070 ¶ 8 (1999) (concluding that the statutory sunset period for alarm monitoring in Section 275 reflected "policy judgment" and "legislative compromise" made by Congress that should not be upset "based on arguments Congress found unpersuasive in 1996," and concluded that the advocate of a different sunset date should demonstrate circumstances that were unanticipated at the time the statute was adopted).

[6] *See* ALTS at 1-3; AT&T at 7, 13-15; Missouri PSC at 2-3; NASUCA at 6-7; New Jersey Division of the Ratepayer Advocate at 7-9; Texas PUC at 4-5; Sprint at 6; Texas OPC at 2-3; TWTC at 4-7; Touch America at 3-5; WorldCom at 2-3.

[7] AT&T at 7, 50-51; NASUCA at 6-8; TWTC at 22-24; Touch America at 3-5; WorldCom at 2-3. *See also* Sprint at 11 ("Until it can be demonstrated that competition exists in all market segments and in all geographic areas that the [Regional] BOC serves, removal of the Section 272 safeguards would be contrary to the public interest.").

[8] *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21905, 22001-02 ¶ 205 (1996) ("*Non-Accounting Safeguards Order*"); *on recon.*, 12 FCC Rcd. 2297 (1997).

[9] 47 U.S.C. § 271(c)(2)(B).

in *these* markets from the BOCs' ability to use their existing market power in local exchange services to obtain an anti-competitive advantage."[10] Similarly, the Commission more recently found that the purpose of Section 272 is to ensure that the "BOCs compete on a level playing field" by ensuring that they do not favor their Section 272 affiliates.[11] Accordingly, there is no basis to conclude that Congress intended that the local markets reach some other additional level of openness -- beyond what it took to receive Section 271 approval -- in order for the provisions of Section 272 to sunset. The proponents of an extension point to no statutory language, legislative history or Commission precedent to the contrary.

Moreover, if Congress had intended that something other than Section 271 approval plus three years to trigger the sunset of Section 272, it would have said so explicitly. In fact, Congress did establish different sunset periods, standards and criteria throughout the 1996 Act.[12] Congress undoubtedly knew how to condition deregulation upon showings different than that established by Section 272. Had Congress intended that Section 272 should sunset only upon some showing of non-dominance or other lack of local market power, it could have and would have done so explicitly.

Finally, as indicated in Qwest' initial comments, enforcement of mechanisms that were intended to protect competition in the local marketplace -- specifically Sections 251 and 271 of

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[10] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 22002 ¶ 206 (emphasis added).

[11] *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, *Memorandum Opinion and Order*, 16 FCC Rcd. 20719, 20780 ¶ 122 (2001).

[12] *Cf.* 47 U.S.C. § 272(f)(2) (Section 272 restriction with respect to interLATA, information services sunsets four years after enactment of the Act); 47 U.S.C. § 273(d)(6) (Section 273 restrictions concerning manufacturing safeguards and standards setting sunset when the "Commission determines that there are alternative sources of industry-wide standards, industry-wide generic requirements, or product certification for a particular class of telecommunications equipment or customer premises equipment available in the United States"); 47 U.S.C. § 274(g)(2) (electronic publishing restrictions sunset four years after enactment of the Act); 47 U.S.C. § 275(a)(2) (alarm monitoring restrictions sunset five years after enactment of the Act).

the Act and the BOCs' performance assurance plans -- is more than sufficient to thwart the possibility that BOCs could engage in anti-competitive behavior.[13]

C. The Attack On The BOCs For Alleged Past Wrongs In Unrelated Areas Cannot Serve As The Basis For Extending The Sunset.

The advocates of an extension use this docket as an excuse to "pile on" the BOCs for every purported misdeed, asserting that alleged past misconduct by the BOCs supports extending the statutory sunset period. But the vast majority of these alleged misdeeds have no relation to Section 272 whatsoever.

Specifically, AT&T claims that the BOCs are transferring valuable assets among their affiliates, but are refusing to price the assets at anything remotely close to the full and fair market value of these assets.[14] CompTel asserts that the BOCs are processing primary interexchange carrier ("PIC") changes in a discriminatory manner.[15] And the Texas PUC asserts that SWBT has engaged in price squeezes with its long distance affiliate.[16]

First, Qwest is not doing (nor will it do) any of the things of which these commenters complain. Moreover, in each case, a remedy exists for this alleged misconduct, regardless of the sunset of Section 272. For instance, if BOCs transfer assets to their affiliates at less than fair market value, such conduct could be remedied through enforcement of the affiliate transaction rules. Similarly, if -- as CompTel alleges but fails to prove -- BOCs process PIC changes in a discriminatory manner, that could be remedied through enforcement of the equal access provisions of the Act, or Section 272(e), which will not sunset, with the assistance of specific

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[13] Qwest also notes that several commenters assert that the Commission must adopt performance measures for special access and unbundled network elements ("UNEs") before Section 272 should sunset. *See, e.g.,* ALTS at 3; Joint Commenters at 6-7; Covad at 1-2; WorldCom at 10-11. Because such measures are the subject of separate proceedings, (*see* In *the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, *Notice of Proposed Rulemaking*, 16 FCC Rcd. 20641 (2001) ("*UNE Measurements and Standards Notice*"); *In the Matter of Performance Measurements and Standards for Interstate Special Access Services, et al.*, *Notice of Proposed Rulemaking*, 16 FCC Rcd. 20896 (2001) (*Special Access Measurements and Standards Notice*)), and because BOC performance in providing special access and UNEs is enforceable without regard to Section 272, this is a *non sequitur* with respect to the sunset.

[14] AT&T at 37.

[15] CompTel at 11-12.

[16] Texas PUC at 6-8.

reporting by the BOCs on providing PIC changes. Similarly, as the Commission has previously found, Section 272(e)(3), which again will not sunset, requires a BOC to "recover access charges from [its long distance] affiliate on the same basis on which it recovers such charges from unaffiliated carriers," and should therefore prevent the BOCs from engaging in "price squeezes" or other anti-competitive conduct.[17]

A few commenters also take specific aim at Qwest. For instance, Touch America and AT&T each raise issues concerning two pending complaints before the Commission that were brought by Touch America relating to Qwest's divestiture of in-region, interLATA customers to Touch America before Qwest's merger with U S WEST, and the conveyance of "indefeasible rights of use" ("IRUs").[18] In particular, relying on a letter of Qwest's then-auditor Arthur Anderson to Dorothy Attwood, AT&T asserts that "Qwest has employed three separate schemes, each of which is patently unlawful," arguing that Qwest has unlawfully provided interLATA service through IRUs and "corporate communications," and directly provided interLATA services "billed and *branded* as Qwest services."[19]

First, AT&T's reliance on the June 6, 2001 Arthur Anderson Letter as support for its assertion that Qwest engaged in "patently unlawful" schemes is disingenuous at best, and patently misleading at worst. With respect to IRUs and corporate communications, the letter merely acknowledged the existence of IRUs and "corporate communications," and specifically declined "to comment on the legal determination as to whether or not these are permitted services."[20]

Second, there is no basis to conclude that these actions violate Section 271, let alone Section 272. Corporate communications, or Official Company Services were previously

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[17] *See In the Matter of Implementation of the Local Competition Provisions Of the Telecommunications Act of 1996*, *Supplemental Order Clarification*, 15 FCC Rcd. 9587, 9597 ¶ 19 (2000) (citing 47 U.S.C. § 272(e)(3)).

[18] AT&T at 41-43; Touch America at 2, 4.

[19] AT&T at 41 (emphasis in original) (citing Letter from Arthur Anderson LLP to Dorothy Attwood (June 6, 2001) ("June 6, 2001 Arthur Anderson Letter"), Findings 2, 7, & 9; Report of Independent Accountants, Att. 1 at 1 (April 16, 2001)).

[20] June 6, 2001 Arthur Anderson Letter, Finding 2.

authorized under the Modification of Final Judgment ("MFJ"),[21] and such previously authorized activities are specifically allowed under Section 271.[22] Similarly, the IRU transactions are facilities transactions and not the provision of "telecommunications services," as the Commission recognized in the Qwest/U S WEST merger[23] and more generally in its universal service proceeding.[24] AT&T reaches the height of shrill invective when it asserts that billing errors were the "most brazen[]" of the alleged schemes. There is no dispute that Touch America, and not Qwest, provisioned and carried the affected services.

Third, these matters are the subject of complaints unrelated to Section 272 before the Commission's Enforcement Bureau, which is where they belong rather than in a collateral and unrelated docket. That the BOCs have been subjected to enforcement actions in the past[25] is not the issue; nor is the issue whether the BOCs may be subject to enforcement actions in the future.[26] The issue is whether similar enforcement of the remaining provisions of the Act and the Commission's regulations will suffice to protect competition in the long distance marketplace.

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[21] *See United States v. Western Electric Co.*, 569 F. Supp. 1057, 1097-1102 (D.D.C. 1983).

[22] 47 U.S.C. § 271(f).

[23] *See In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, *Memorandum Opinion and Order*, 15 FCC Rcd. 11915, 11929-30 ¶ 38 (2000).

[24] *See In the Matter of Federal-State Joint Board on Universal Service*, *Fourth Order on Reconsideration*, 13 FCC Rcd. 5318, 5479 ¶ 290 (1997) (lease of satellite transponder capacity is not the provision of telecommunications service under the 1996 Act); *Report and Order*, 12 FCC Rcd. 8776, 8864-65 ¶ 157 (1997), *aff'd sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (lessor of UNEs, including dark fiber and transport, is a "facilities-based" provider of local telecommunications for purposes of Section 271(a) analysis, not a reseller of service).

[25] Qwest also notes that AT&T raises an enforcement action the Colorado Public Utilities Commission took against Qwest regarding the extension of PIC freezes for intraLATA toll. AT&T at 30-32. Sprint also points to a consent decree in which Qwest agreed to make a payment to the United States Treasury and to adopt new policies to terminate an investigation concerning Qwest's compliance with 47 C.F.R. § 51.321(h) regarding posting of notice of exhausted collocation space on its website. Sprint at 15.

[26] Sprint suggests that because there is the possibility that the BOC may not comply "under more relaxed regulatory safeguards" the sunset should not be allowed to occur under the statutory timeframe. *See* Sprint at 16.

D. Enforcement Of Remaining Mechanisms After Sunset Will More Than Suffice To Protect Competition In The Long Distance Market.

Contrary to the suggestions of some commenters that Section 272 is the only restraint on the BOCs' incentives and ability to discriminate and cross-subsidize,[27] numerous mechanisms will remain to protect competition in the long distance marketplace. As the Commission itself previously recognized in the *Non-Accounting Safeguards Order*, "[a] number of safeguards will be available to prevent discriminatory behavior by BOCs after the separate affiliate requirements of section 272 cease to apply."[28] Despite this conclusion by the Commission, TWTC asserts that regulation of the BOCs' market power "must take the form of a separate affiliate to be effective," and that the Commission repeated this conclusion throughout the *Non-Accounting Safeguards Order*.[29] In addition to ignoring the fact that *Congress* intended that the separate affiliate requirements sunset, TWTC's assertion ignores the Commission's repeated determination that structural separation was not necessary to ensure a level playing field in the new markets the BOCs were entering.[30]

Most recently, in declining to extend the sunset of Section 272 with respect to interLATA information services, the Commission specifically cited Sections 201, 202, 251(c)(5), 251(g), and 272(e) of the Act to support its conclusions that "there are nonstructural safeguards that will limit the BOCs' ability to discriminate against nonaffiliated information service providers."[31] Moreover, these various obligations are enforceable under the authority of Sections 4(i), 201, 202, 206-209, 271(d), and 503 of the Act.[32]

Furthermore, contrary to the assertion of some commenters that the BOCs have an incentive to pad the rate base with artificial increases in costs to make it appear that they are

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[27] *See, e.g.,* AT&T at 50; Joint Commenters at 2-5.

[28] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 22036 ¶ 271 (citing Sections 201-202; 251(c)(3), (5); Section 251(g)) (*cited in* SBC at 12; BellSouth at 18).

[29] TWTC at 14-15.

[30] *See* Qwest's Initial Comments at 5-6.

[31] *In the Matter of Request for Extension of the Sunset Date of the Structural, Nondiscrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services*, *Order*, 15 FCC Rcd. 3267 (2000).

[32] USTA at 8; Verizon at 15.

earning only a reasonable profit on regulated service,[33] the Commission itself has found that price cap regulation has reduced the incentive of the BOCs to allocate nonregulated costs to regulated services.[34]

Finally, AT&T argues that because many of the Section 272 safeguards are plainly overlapping and interdependent, no one provision is clearly severable from the rest without upsetting the separate-affiliate structure mandated by the Act.[35] Yet this argument plainly ignores the fact that Congress itself singled out a portion of Section 272 -- specifically Section 272(e) -- that would remain in effect after the remainder of the Section sunset.[36]

E. The Costs To The BOCs And To Consumers Do Not Justify Any Purported Benefits Of Extending The Sunset.

The proponents of an extension also ignore the harm to consumers from unnecessary mechanisms such as structural separation in the form of increased costs and diminution in robust competition.[37] The quality and price of service in the long distance market will undoubtedly improve when the BOCs will be able to compete against the oligopolists unfettered by structural separation. These costs to society, when weighed against the evidence demonstrating that the extension of the sunset is unnecessary, demonstrate that Section 272 should be allowed to sunset pursuant to the three-year statutory period.

F. Qwest Supports The Proposal To Eliminate The OI&M Rules.

Qwest supports the proposal to eliminate the prohibition against the sharing of operating, installation, and maintenance ("OI&M") services between the BOCs and their Section 272 affiliates.[38] In addition to the reasons stated in Verizon's comments, Qwest believes that the elimination of the OI&M rules is supported by the statute itself. In general, Congress intended

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[33] TWTC at 12-13.

[34] *See In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, *Notice of Proposed Rulemaking*, 11 FCC Rcd. 18877, 18942-43 ¶ 136 (1996) (citations omitted).

[35] AT&T 50-53.

[36] *See* 47 U.S.C. § 272(f)(1).

[37] *See* SBC at 8; USTA at 7; Verizon at 8-11.

[38] *See* Verizon at 15-21; USTA 8-9.

that, subject to the posting and non-discrimination obligations, the BOCs would provide services to their Section 272 affiliate without any prohibition on the nature of the services provided. Indeed, where Congress intended to prohibit the BOCs from providing certain services to their affiliates, it did so explicitly. For instance, the only services that Congress explicitly prohibited the BOCs from providing their Section 272 affiliates were the sales or marketing of in-region, interLATA services of the BOCs' Section 272 affiliates occurring prior to Section 271 approval.[39] Similarly, Congress explicitly prohibited the BOCs from providing certain services to their electronic publishing affiliates, including "installation" and "maintenance" services.[40] Had Congress intended to prohibit the BOCs from providing OI&M services to their Section 272 affiliates, it would have explicitly done so.

II. CONCLUSION

For the reasons stated above, other than the requirements of Section 272(e) and its associated reporting obligations, the Commission should allow the requirements of Section 272 to sunset after the statutory three-year period without extending the sunset date.

Respectfully submitted,

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[39] 47 U.S.C. § 272(g)(2).

[40] 47 U.S.C. § 274(b)(7).

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST SERVICES CORP. ON SECTION 271(f)(1) SUNSET OF THE BOC SEPARATE AFFILIATE AND RELATED REQUIREMENTS** to be 1) filed with the Secretary of the FCC via the FCC's Electronic Comment Filing System; 2) a copy to be served via e-mail on the FCC's contractor Qualex International; and 3) a copy to be served, via First Class United States mail, postage prepaid, on all parties listed on the attached service list.

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August 26, 2002

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